STATE OF MICHIGAN

COURT OF APPEALS

TRANSPORTATION INSURANCE COMPANY,

Plaintiff-Appellant,

and

MEXICAN STAMPING & FABRICATING,

Plaintiff,

v

DETROIT EDISON COMPANY,

Defendant-Appellee.

UNPUBLISHED
December 16, 2003

No. 239142
Monroe Circuit Court
LC No. 97-006530-NZ

TRANSPORTATION INSURANCE COMPANY,

Plaintiff-Appellant,

and

MEXICAN STAMPING & FABRICATING,

Plaintiff,

v

DETROIT EDISON COMPANY,

Defendant-Appellee.

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TRANSPORTATION INSURANCE COMPANY,

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No. 239144
Monroe Circuit Court
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Before: Markey, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Plaintiff appeals from a jury verdict of no cause of action and an order of final judgment entered by the trial court on June 27, 2001. We affirm.

I. Facts

This case arises out of a fire at the Mexican Stamping and Fabricating, Inc. plant at 1250 East First Street in Monroe. Plaintiff, Transportation Insurance Company, a division of CNA Insurance Companies, filed suit as the subrogee of Mexican Stamping, and alleged that it paid $1,792,909.21 to Mexican Stamping as a result of the fire and that defendant, Detroit Edison Company, caused the fire by negligently supplying electricity to the Mexican Stamping plant.[1]

II. Analysis

A. Verdict and Weight of the Evidence

Plaintiff contends that the verdict was against the great weight of the evidence and that the trial court erred by failing to grant its motions for directed verdict, judgment notwithstanding the verdict (JNOV) or new trial.[2] We disagree.

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[1] In its complaint, plaintiff also asserted claims of breach of contract, breach of warranty, products liability, and nuisance, but none of the claims survived to trial. The trial court granted defendant's motion for summary disposition on plaintiff's breach of contract and nuisance claims on October 12, 1999, and plaintiff has apparently abandoned the other claims. Plaintiff does not raise any of these claims on appeal.

[2] As this Court explained in *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491, 668 NW2d 402 (2003):

> This Court reviews de novo a trial court's grant or denial of a directed verdict. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 701; 644 NW2d 779 (2002). In doing so, we view the evidence in the light most favorable

(continued…)

The trial court correctly denied plaintiff's motions because defendant refuted plaintiff's evidence during cross-examination and the verdict was clearly supported by the evidence. While plaintiff presented evidence of defendant's duty to notify customers when it increases the available fault current, defendant clearly established that, here, the alleged "major" increase in available fault current occurred in the late 1960s or early 1970s, some twenty-five or more years before Mexican Stamping moved into the plant. Further, while plaintiff presented expert testimony regarding the alleged over-fusing "on the primary side," (at defendant's transformer), defendant presented expert testimony to establish that (1) defendant's fuse was properly sized, and (2) the primary fuse is intended to protect defendant's equipment outside the building, not Mexican Stamping's internal electrical equipment.

Defendant also presented considerable evidence to show that (1) the electrical equipment inside the Mexican Stamping plant was antiquated, hazardous, and in violation of the National Electrical Code, (2) the fire started because of old and faulty wiring inside the plant, (3) no power surge or increase in current could have caused the damage that occurred, and (4) the Mexican Stamping fuse panels were in poor condition, fuses inside the plant were the wrong

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(…continued)

> to the nonmoving party. *Id*. at 701-702. Further, this Court recognizes the unique opportunity of the jury and the trial judge to observe witnesses and the fact-finder's responsibility to determine the credibility and weight of the testimony. *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). If reasonable jurors could honestly have reached different conclusions, this Court may not substitute its judgment for that of the jury. *Hunt v Freeman*, 217 Mich App 92, 99; 550 NW2d 817 (1996).

The *Wiley* Court also explained our review of JNOV decisions at 492-492:

> This Court reviews de novo the trial court's decisions on a motion for JNOV. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 321; 602 NW2d 633 (1999). We review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Attard, supra*. Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion be granted. *Orzel v Scott Drug Co*, 449 Mich 550, 557-558; 537 NW2d 208 (1995).

Regarding plaintiff's claim that it is entitled to a new trial because the verdict was against the great weight of the evidence, this Court explained in *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003):

> We review the trial court's denial of a motion for a new trial for an abuse of discretion. In deciding whether to grant or deny a motion for a new trial, the trial court's function is to determine whether the overwhelming weight of the evidence favors the losing party. This Court gives substantial deference to a trial court's determination that the verdict is not against the great weight of the evidence. This Court and the trial court should not substitute their judgment for that of the jury unless the record reveals that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. [Citations omitted.]

size, overheating had been reported, cords had open splices in them, employees had hand-twisted wires together and taped them, and electrical repairs had been recommended but were never done. Further, defendant presented evidence that, notwithstanding local ordinances, Mexican Stamping employees performed significant structural and electrical work in the building without obtaining permits or electrical inspections.

Also, a reasonable juror also could have concluded that the fire was intentionally set. While plaintiff's witnesses testified that they did not find specific evidence of arson, two of plaintiff's experts, Gary Mihalek and Donald Worden, testified that they concluded that the cause of the fire is "undetermined." Fire Marshall James Kansier posted the site as a possible arson and also concluded that its cause is undetermined. Both plaintiff and defense witnesses testified that certain facts surrounding the fire raised "red flags" regarding a potential arson determination, including orders to move flammable materials, stolen equipment, unsecured areas, an open door, recently increased insurance coverage, missing business records, lack of cooperation with the fire investigation, significant business debt, and dwindling company profits.

Clearly, the evidence presented supported the jury's no-cause verdict. A reasonable jury could have easily concluded that defendant played no role in the fire and that the fire was the result of an electrical failure inside the plant or that the fire was intentionally set. Therefore, the trial court correctly declined to substitute its judgment for the jury and, thus, properly denied plaintiff's motions for JNOV and a new trial.[3]

B. Manuals

Plaintiff contends, erroneously, that the trial court erred by denying its motion to introduce certain Detroit Edison manuals at trial.[4] It is undisputed that the manuals plaintiff sought to introduce, the Distribution Design Guide Manual and the Overhead Lines Construction Standards book, are internal procedure manuals. It is well settled in Michigan that internal

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[3] Because we hold that the jury verdict was amply supported by the evidence, we need not consider plaintiff's claims regarding the exclusion of replacement cost evidence.

[4] In *Bachman v Swan Harbour Ass'n*, 252 Mich App 400, 438; 653 NW2d 415 (2002), this Court explained:

> The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Chmielewski* [*v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998)]. An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999), or the "result is so palpably and grossly violative of fact and logic that it evidences perversity of will, a defiance of judgment, or the exercise of passion or bias," *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

company manuals, guidelines or rules are not admissible to establish the standard of care in a negligence action. See *Zdrojewski v Murphy*, 254 Mich App 50, 62-63; 657 NW2d 721 (2002); *Hartmann v Shearson Lehman Hutton, Inc*, 194 Mich App 25, 28-29; 486 NW2d 53 (1992); *Gallagher v Detroit-Macomb Hosp Ass'n*, 171 Mich App 761, 764-765; 431 NW2d 90 (1988), citing *McKernan v Detroit CSR Co*, 138 Mich 519; 101 NW 812 (1904), *Dixon v Grand Trunk WR Co*, 155 Mich 169, 173; 118 NW 946 (1908) and *Wilson v WA Foote Memorial Hospital*, 91 Mich App 90, 95; 284 NW2d 126 (1979). While our Courts have "distinguished between internal policies and external rules promulgated pursuant to law," plaintiff has failed to make such a distinction to support its argument on appeal. *Zdrojewski, supra* at 62. Moreover, plaintiff has not described in any detail the portions of the manuals that would have been relevant at trial. Accordingly, the trial court did not abuse its discretion by denying admission of the evidence at trial.[5]

C. Certificate of Occupancy

Plaintiff further asserts that the trial court erred by admitting evidence that Mexican Stamping was illegally operating in the building without a certificate of occupancy.[6] According to plaintiff, the trial court failed to exercise its duty to decide the applicability of the statutes before trial.

The trial court did not abuse its discretion in admitting Michael Bosanac's testimony regarding the application of the local ordinances. As plaintiff correctly notes, the interpretation of a city ordinance is an issue of law for the trial court. See *Jones v Wilcox*, 190 Mich App 564, 566; 476 NW2d 473 (1991). Here, neither party contends that the Monroe permit requirements are ambiguous. Rather, plaintiff argues that the trial court erred by failing to rule on the applicability of the ordinances as a matter of law. While the trial court's ruling could have been clearer, in context, it is apparent that the trial court ruled, as a matter of law, that the ordinance should be admitted because evidence established that Mexican Stamping may have begun a new use of the property. Moreover, other evidence showed that Mexican Stamping employees renovated the building and made significant electrical changes, both of which would have clearly required a permit under the local ordinance. Thus, contrary to plaintiff's assertions on appeal, the trial court ruled on the motion as a matter of law and properly allowed the jury to consider the conflicting factual issues at trial.

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[5] We also note that plaintiff makes two, seemingly contradictory arguments in its appeal brief regarding the necessity of defendant's manuals at trial. Given plaintiff's confusion regarding the appropriate use of the manuals, the trial court was clearly correct in anticipating that reference to the manuals might cause juror confusion. Moreover, while plaintiff asserted below that it planned to use the manuals only for impeachment purposes, once the trial court allowed plaintiff to introduce defendant's Green Book, plaintiff relied on the evidence only to establish the standard of care. Accordingly, plaintiff's claim that it would have used the other manuals for a proper purpose is less than convincing.

[6] "The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion." *Bachman, supra* at 438.

D. Denbrock's Testimony

Plaintiff argues that the trial court erred by limiting plaintiff's use of Frank Denbrock's deposition testimony.[7]

This Court has held that a party may subpoena a non-testifying expert hired by an opposing party. *Kissel v Nelson Packing Co*, 87 Mich App 1, 3-4; 273 NW2d 102 (1978). In *Kissel*, this Court ruled that, if an expert has first-hand knowledge of injuries or damages, he may describe those injuries "and give expert inferences therefrom." *Id*. at 4. According to *Kissel*, "[s]uch testimony does not fall within any work-product restriction . . . ." *Id*.

Here, the trial court excluded Denbrock's testimony that, (1) *hypothetically*, arcing within a conduit near flammable material might cause a fire, (2) parallel transformers with differing impedance levels are uncommon, (3) *hypothetically*, a fault that exceeded a building's fusing system could be destructive, (4) *if* defendant constructed larger distribution lines, defendant has the responsibility to notify the customer that the available fault current increased, and (5) another alleged opinion that is not apparent from the record. Defendant argued that this "opinion" testimony should be excluded as work product, apparently under the *Kissel* reasoning that the work-product restriction may apply where an "attorney's consultation with [a non-testifying] expert contributes to the attorney's conclusions and legal theories . . ." but not where the opinions are based on observed facts in the case. *Id*.

Pursuant to *Kissel*, the testimony of an adverse, non-testifying expert is limited to first-hand, factual knowledge and any opinions extrapolated from those factual observations. Under this rule, the trial court correctly excluded the testimony as not based on factual observations regarding the evidence in the case, but on opinions about hypothetical matters. Given defense counsel's decision not to call Denbrock at trial, such testimony falls under the category of "consultation" that contributes to the attorney's theories and conclusions. Moreover, were we to find that the trial court erred in excluding the testimony, the decision was clearly harmless because the testimony would have been cumulative of other testimony at trial.[8]

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[7] "The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion." *Bachman, supra* at 438. Further, "the trial court has the responsibility to control the introduction of evidence and the arguments of counsel and to limit them to relevant and material matters." *Tobin v Providence Hosp*, 244 Mich App 626, 640; 624 NW2d 548 (2001).

[8] Further, a review of the record leads us to agree with defendant's assertion that plaintiff's true purpose in relying on Denbrock's testimony was to argue to the jury that Denbrock, a defense expert, offered opinions contrary to those of Detroit Edison at trial. Plaintiff clearly indicated the intent to do so during oral argument and, according to *Kissel*, reference to an expert's original employment is inadmissible. See also *Laudenslager v Covert*, 163 Mich App 484, 489-490; 415 NW2d 254 (1987). In *Kissel*, the Court stated:

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E. Pipe Exhibit

Plaintiff maintains that the trial court erred when it reversed its prior ruling and allowed defendant to present a length of pipe that witness John Loud split with a welder.

Despite the contentious history of this demonstrative exhibit, plaintiff's only argument on appeal concerning the pipe is that it "served to confuse, mislead and prejudice the jury in direct violation of MRE 403 and 901." Because plaintiff fails to further explain its reasoning, we hold that plaintiff has abandoned the issue. Further, the record clearly reflects that the trial court merely enforced a pretrial agreement that defendant could use the pipe at trial. Also, plaintiff does not explain how or why the authentication rule, MRE 901, applies to a demonstrative aid when defense counsel made no effort to admit it as evidence at trial. Moreover, though plaintiff does not expand on its argument about jury confusion and prejudice, John Loud clearly explained the exhibit to the jury and plaintiff had ample opportunity to cross-examine him about it. In sum, plaintiff's claim on this issue is without merit.[9]

F. Mediation Panel

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> The plaintiff has raised a collateral question as to whether the testimony of [the expert] may be bolstered by the fact that he was originally employed by the defendant. We answer in the negative.
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> Testimony as to the expert's original employment is not pertinent to any issue presented, and neither party should be bound by the rejected opinions of experts employed by him to assist in evaluating his case. Furthermore, the credibility of a witness generally may not be bolstered until attacked, McCormick, Evidence (2d ed), § 49, p 102, and we see no reason to deviate from the general rule. [*Kissel, supra* at 5.]

[9] We reject plaintiff's claim that the trial court unfairly limited plaintiff's counsel's arguments at trial. The record shows that the parties entered a stipulated order regarding the comments that were prohibited at trial. Indeed, it appears that plaintiff's counsel signed the order and "approved [it] as to form and as to content." Though plaintiff's trial counsel, Ronald Mellish, later argued that his colleague signed the order and that he would never have done so, this Court has held that an order approved as to form and content ordinarily "cannot be attacked or altered absent proof of a mistake, inadvertence, surprise or excusable neglect." *Wold v Jeep Corp*, 141 Mich App 476, 479; 367 NW2d 421 (1985), citing 7 Callaghan's Michigan Pleading & Practice (2d ed), § 45.09, pp 106-107. Plaintiff raises no such argument in this case.

Further, it is well established in this state that asking a jury to "send a message" to a corporate entity by returning a verdict in favor of the plaintiff is improper. *Hunt v CHAD Enterprises, Inc*, 183 Mich App 59, 65; 454 NW2d 188 (1990). This Court has also held that it is improper for trial counsel to argue that the defendant is a large, wealthy, insensitive corporation that deserves to be punished through an adverse jury verdict. *Fellows v Superior Products Co*, 201 Mich App 155, 158-164; 506 NW2d 534 (1993). Plaintiff does not explain how the order otherwise prevented it from making "fair commentary" on the evidence and, therefore, we need not consider the issue further.

Plaintiff contends that the mediation panel was unqualified to properly evaluate the case. We agree with the trial court that plaintiff waived this issue because he failed to file an objection, though he was aware of who was on the mediation panel for approximately two months before the hearing. Under MCR 2.403(B)(2)(C)(1), "[t]o object to case evaluation, a party must file a written motion to remove from case evaluation and a notice of hearing of the motion and serve a copy on the attorneys of record and the ADR clerk within 14 days after notice of the order assigning the action to case evaluation." Pursuant to this rule, plaintiff waived his claim regarding the qualifications of the mediators by failing to timely object and plaintiff will not be heard to complain about the composition of the panel only after it received an unfavorable result.

G. Jury Instructions

Plaintiff asserts that the trial court erred by refusing to instruct the jury that defendant had a duty to advise customers of an increase in the available fault current.[10] In its order regarding plaintiff and defendant's motions for summary disposition, the trial court considered whether defendant had a duty to inform customers about changes in available fault current. In addressing the existence of that duty, the trial court concluded that, while a utility must inform its customers regarding an increase in available fault current, the issue of duty in this case was one of law *and* fact because the parties disagreed whether (1) defendant increased available fault current only at the customer's request and (2) whether adequate warning was given under the circumstances of this case.

At trial, defense counsel clearly established that, while there may have been an increase in available fault current when defendant added the second set of transformers, (1) that increase would only have been at the customer's request and, therefore, the customer would have known

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[10] As this Court recently explained in *City of Novi v Woodson*, 251 Mich App 614; 651 NW2d 448 (2002), "[t]his Court 'review[s] jury instructions in their entirety to determine whether the instructions given adequately informed the jury regarding the applicable law reflecting and reflected by the evidentiary claims in the particular case.' " *Id*. at 630, quoting *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 459, 633 NW2d 418 (2001). The *Novi* Court, at 630-631, also quoted from *Central Cartage Co v Fewless*, 232 Mich App 517, 528; 591 NW2d 422 (1998), in which this Court also explained:

> Generally, a trial court may give an instruction not covered by the standard instructions as long as the instruction accurately states the law and is understandable, concise, conversational, and nonargumentative. Supplemental instructions need not be given if they would add nothing to an otherwise balanced and fair jury charge nor enhance the ability of the jury to decide the case intelligently, fairly, and impartially. Moreover, it is error to instruct a jury with regard to a matter not sustained by the evidence or the pleadings. Jury instructions are to be reviewed in their entirety, and there is no error requiring reversal if, on balance, the theories of the parties and the applicable law were fairly and adequately presented to the jury. [Citations omitted; see also MCR 2.516(D)(4).]

about the increase, and (2) the increase in fault current about which plaintiff complained throughout the trial actually occurred in the late 1960s or early 1970s, approximately twenty-five years before Mexican Stamping moved into the plant. Accordingly, plaintiff's request that the trial instruct the jury that defendant had a duty to inform customers about increases in fault current would have distorted the facts adduced at trial and would not have fairly apprised the jury of the applicable law. Plaintiff presented no evidence regarding defendant's failure to inform the occupants of the building about the increase in the 1960s or 1970s and plaintiff did not establish that defendant intentionally increased the available the fault current at any other time without informing Mexican Stamping. Therefore, plaintiff's argument is without merit.[11]

Affirmed.[12]

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Henry William Saad

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[11] Plaintiff contends that the cumulative effect of the claimed errors denied it a fair trial. We disagree because plaintiff has shown no error.

[12] We decline to address plaintiff's claim that the trial court erred by ordering the jury to begin its deliberations after 5:00 p.m. because plaintiff waived the issue. Plaintiff voiced no objection to the trial court's decision to allow the jurors to begin deliberations, though it clearly could have requested the court to adjourn for the day. Moreover, the record reflects that, the day before the final day of trial, the court specifically told the jurors that they might be in court later than 5:00 p.m. the next day and that, during deliberations, the jury could stay as long as they wished. Again, plaintiff failed to object to the trial court's statements and we need not consider the issue further.